In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-250

WILLIAM BATES COLE, JR., PETITIONER

v.

JAMES R. SCHLESINGER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends (1) that he was denied due process because the Air Force did not allow him to review and rebut the Staff Judge Advocate's adverse recommendation on his application for discharge as a conscientious objector, and (2) that the denial of his application had no "basis in fact."

Petitioner filed a petition for a writ of *habeas corpus*, seeking a discharge from the Air Force, in the United States District Court for the District of Colorado. The district court denied the petition (Pet. App. 26-28), and the court of appeals affirmed (Pet. App. 15-24).

Petitioner enlisted in the Air Force on June 21, 1972, for a period of four years' active duty. On January 23, 1973, while training as a bomb-navigation systems mechanic, petitioner submitted his application for discharge, claiming that he was a conscientious objector.

Petitioner stated that he was "a totally nonviolent person who does not believe in physically harming another human being under any circumstances * * * even in self defense" (S.R. 18).[1] While he acknowledged that his beliefs were "based on moral rather than religious convictions" (*ibid.*), he stated that "[t]he core of all my beliefs come [sic] from Jesus Christ and His creed of 'always turning the other cheek'" (S.R. 19). He said that idea had been conveyed to him by his wife over a year earlier and had crystallized when he discovered he was working on aircraft that "dropped conventional weapons" rather than nuclear bombs, since he believed that the latter would never be used (*ibid.*).

Petitioner was interviewed by a chaplain, a psychiatrist, and a hearing officer, all of whom reported that they believed petitioner to be sincere in his beliefs. Petitioner was then given his record, which contained the reports of these officers. In accordance with Air Force Regulation 35-24, para. 11f, he was given the right to submit a rebuttal; he responded that he did not wish to do so.

The record was then sent to the Staff Judge Advocate for legal review. The Staff Judge Advocate reviewed the record and determined that petitioner's beliefs were not "deeply held" (S.R. 11). He based this determination on petitioner's actions, which were judged to be inconsistent with his professed beliefs. The Staff Judge Advocate noted that petitioner's "willingness to work on an aircraft carrying nuclear weapons is incompatible with a belief in opposition to all wars; certainly, it is an unreasonable belief to think that nuclear weapons are not for the purpose of waging war" (*ibid.*). Following the

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[1] "S.R." refers to the Supplemental Record on Appeal.

Staff Judge Advocate's recommendation of disapproval, the record was transferred up the chain of command, with each level adopting the Staff Judge Advocate's analysis and recommending that the application be disapproved. On May 23, 1973, the Air Force denied petitioner's application.

1. Petitioner contends that he was denied due process because he was not allowed to review and rebut the Staff Judge Advocate's legal analysis and adverse recommendation on his application, prior to its submission for a determination by the final reviewing authority. This contention is without merit.

Air Force regulations provide that an applicant be allowed to review and rebut "any additional information * * * which is adverse to the applicant" considered at the decisional level of review (AFR 35-24, para. 13; Pet. 3). The court below correctly held that the term "information" in that regulation meant factual information and not opinions and recommendations, such as the Staff Judge Advocate's legal analysis of, and recommendation based on, previously established facts that petitioner had already had an opportunity to rebut (S.R. 12).

Petitioner was given an opportunity to review and rebut all of the factual information relied upon by the Air Force in considering his application. In addition he was provided, as required by regulation (S.R. 2; AFR 35-24, para. 13), with a statement of reasons for the denial of his application. Petitioner was thus apprised of all of the evidence and the basis of decision. Due process requires no more. The analysis of the evidence and recommendation by the various levels of review are merely agency staff work designed to assist the deciding authority. Due process no more requires their disclosure than it would the recommendation of a law clerk to a judge.

Neither this Court's opinions in *Gonzales* v. *United States*, 348 U.S. 407, and *Simmons* v. *United States*, 348 U.S. 397, nor the holding in *Crotty* v. *Kelly*, 443 F. 2d 214 (C.A. 1), conflict with the decision of the court below. *Simmons* held that a registrant was entitled to a fair resume of an FBI report prior to the hearing before the Selective Service Appeal Board, so that he could rebut any adverse evidence contained in the report. *Gonzales* held that a registrant was entitled to a copy of the Department of Justice's recommendation and an opportunity to submit a reply to the Appeal Board. Both cases were "concerned with the failure to give the would be conscientious objector a copy of a report and recommendation made by an investigative body charged with checking into and generally making an investigation of the entire matter" (Pet. App. 21). Likewise, *Crotty* v. *Kelly*, *supra*, concerned the failure to give a conscientious objector applicant an opportunity to review and rebut the reports of the investigating officers, *i.e.*, the chaplain, hearing officer, psychiatrist and commanding officer. By contrast, petitioner received the full results of the investigation prior to the denial of his application.

2. Petitioner also contends that there was no "basis in fact" for the denial of his application for conscientious objector discharge. However, as stated in the court of appeals opinion, upon which we rely, the Air Force could and did draw the permissible inference that petitioner was not sincerely opposed to war in all forms, as he claimed, from the fact that "he had not objected to equipping aircraft with nuclear weapons, because in his own mind he doubted that nuclear bombs would ever be dropped, but that he could not bring himself to placing conventional weapons on aircraft, knowing that such might some day be put in actual use" (Pet. App. 23). As the Air Force and the court below found, this attempt-

ed distinction is not consistent with an across-the-board objection to war. Additionally, the court below upheld the Air Force's finding that petitioner's decision to request a discharge was only transitory in nature, based more on his wife's influence than on deeply held moral convictions. Contrary to findings of the military in *Cohen* v. *Laird*, 315 F. Supp. 1265, 1278 (D. S.C.), and *Ptak* v. *Laird*, 335 F. Supp. 727, 730 (D. Col.), relied upon by petitioner, this finding was amply supported by facts in the record. Petitioner's application stated that his wife put the idea in his head (S.R. 19) and the chaplain stated that it was the influence of petitioner's wife and certain peers that brought him to his present position (S.R. 34). Thus, there was a basis in fact for the Air Force's finding.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[2]The cases relied on by petitioner do not support the proposition that the opinions of interviewing officers are conclusive on the issue of sincerity. In those cases, the courts pointed out that those officers found the applicants sincere, but they did not conclude that, therefore, the applicants could not be found insincere. Rather, they pointed out there were no facts in the record upon which the final reviewing authority could base a finding of insincerity. Here, there were such facts.